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# Brexit and the Common Law Constitution

Gordon Anthony \*

## Abstract

This article considers the implications that Brexit holds for the UK's "common law constitution" – the body of principles and norms that the courts have developed in case law on EU membership, fundamental rights, and devolution. Focusing on the Supreme Court's ruling in *Miller*, it argues that Brexit may have paradoxical effects within the case law. These start with the fact that the Supreme Court rationalised EU withdrawal in terms of Parliamentary sovereignty, but in a manner that perhaps also casts doubt on the utility of distinctions between "internal" and "external" law. However, this reliance on Parliamentary sovereignty as UK law's "rule of recognition" is seen as more problematic in the context of rights and devolution, where the article notes a number of tensions in the law. In relation to rights, these are a result of an apparent retreat from a line of case law that had previously indicated that the courts might impose substantive limits on the powers of the Westminster Parliament. The tensions around devolution are a result of the subordinate role that the rule of recognition accords to devolved institutions and its inability to accommodate any conception of "divided sovereignty".

## Key words

Brexit; Supreme Court; common law constitution; Parliamentary sovereignty; rights; devolution.

## Introduction

For quite some time now, a dominant theme in UK public law scholarship has been the role that the courts play in shaping the "common law constitution".<sup>1</sup> In much of the literature, the term has been used to describe principles and norms that the courts have developed within their judicial review jurisdiction in cases concerning, among other things, EU membership, the protection of fundamental rights, and the nature of the UK's devolution settlement.<sup>2</sup> Conceptually, much of the case law has touched upon contested assumptions about legal and political constitutionalism,<sup>3</sup> where the courts' function in defining legal sovereignty and the rule of law has allowed them to absorb a range of global and European influences.<sup>4</sup> However, while the case law has remained sensitive to "history ... the

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\* Professor of Public Law, Queen's University, Belfast. This article draws upon a number of papers that were presented at Cardiff University, the University of Luxembourg, and the University of Bordeaux. My thanks are due to Dr Jo Hunt, Professor Robert Harmsen, and Professor Olivier Dubos for their kind invitations to speak, and to colleagues who commented on earlier versions: Patrick Birkinshaw (the editor of EPL); Brice Dickson; Kieran Bradley (who responded to my presentation in Luxembourg); Leanne Cochrane; Conor McCormick; Chris McCrudden; and John Morison. My thanks are also due to Professor Dagmar Schiek, the Principal Investigator on the European Commission funded project, *Tensions at the Fringes of the European Union* – some of the research for this article was developed under that theme. Errors and omissions are mine.

<sup>1</sup> See J Leslie, 'Vindicating Common Law Constitutionalism' (2010) 30 *Legal Studies* 301 and literature therein.

<sup>2</sup> CF Forsyth (eds), *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000); Sir John Laws, *The Common Law Constitution* (Cambridge University Press, 2014).

<sup>3</sup> On the corresponding debates see P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) pp 166-199.

power of continuity”<sup>5</sup> – a point that has been emphasised in the context of fundamental rights cases in particular<sup>6</sup> – the imagery of continuity is now coming under very real strain. This is, of course, one of the immediate out-workings of Brexit, which is complicating not only the UK’s “outward” legal relations with the EU, but also its “internal” arrangements for devolution. Such complications have already raised a number of foundational questions about the role of the courts, where the Supreme Court’s ruling in *Miller* came to rely upon what was, in essence, a Diceyan view of orthodoxy.<sup>7</sup> On the facts of that case, Article 50 TEU could thus be triggered only on foot of an Act of Parliament<sup>8</sup>, while disputes about the devolution settlement were matters for the political powers.

The purpose of this article is to consider how the common law constitution might now develop in the light of Brexit. Certainly, there is a superficial attraction to the idea that much of law and politics in the UK has reached something of a crisis point, as the process of EU withdrawal entails novel and far-reaching institutional changes.<sup>9</sup> However, for the common law constitution, it may be that Brexit will represent more of a paradox than a crisis in so far as the courts have been able to rationalise the fact of withdrawal, albeit in terms that may give rise to tensions in the law. This is largely a point about a line of reasoning in *Miller* which confirmed that the sovereignty of the Westminster Parliament is UK law’s ultimate “rule of recognition” and that EU law’s primacy under the European Communities Act 1972 is contingent upon that rule.<sup>10</sup> While the Supreme Court’s reasoning in this regard was arguably at one with historical experience in the EU – national courts have long prioritised internal points of legitimation in the context of membership<sup>11</sup> – the Supreme Court’s approach has highlighted a number of actual and potential tensions. One of these centres upon the post-withdrawal relationship that the common law might have with EU law, where orthodoxy would suggest a bright-line distinction between the two but where other aspects of *Miller* tend towards a more nuanced relationship. And some other areas in which there will be a more immediate tension are those concerning the protection of fundamental rights and devolution: while the courts had previously made statements about the possibility of common law review of Acts of

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<sup>4</sup> See R Rawlings, P Leyland and A Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press, 2013).

<sup>5</sup> Laws, n 2 above, pp 8-9. See also JWF Allison, *The English Historical Constitution: Continuity, Change, and European Effects* (Cambridge University Press, 2007).

<sup>6</sup> Eg, *Re Reilly’s Application* [2013] UKSC 61, [2014] AC 1115.

<sup>7</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

<sup>8</sup> See, subsequently, European Union (Notification of Withdrawal) Act 2017.

<sup>9</sup> For some perspectives see P Birkinshaw’s range of ‘Brexit Editorial’ commentaries in (2016)-(2018) 22-24 EPL; K Armstrong, *Brexit Time: Leaving the EU – Why, How and When?* (Cambridge University Press, 2017); M Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia, 2017); and A Biondi and P Birkinshaw (eds), *Britain Alone? The Implications and Consequences of UK Exit from the EU* (Wolters/Kluwer, 2016).

<sup>10</sup> See also *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324, 349, para 79, Lord Reed, and *Pham v Secretary of State for Home Department* [2015] UKSC 19, [2015] 1 WLR 1591, 1617, para 80, Lord Mance.

<sup>11</sup> See P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, 6<sup>th</sup> ed, 2015), ch 9.

the Westminster Parliament and the emergence of a “divided sovereignty” in the UK, *Miller* would appear to have taken the law away from any such modelling.<sup>12</sup>

In developing these points, this article divides into three sections on EU membership and Brexit; the protection of fundamental rights; and devolution. The section on EU law and Brexit examines more fully the Supreme Court’s approach to the rule of recognition and EU membership, before analysing the post-withdrawal relationship that the common law might have with EU law. The argument that is made here is that there are areas such as non-discrimination law and environmental law in which the common law may continue to be influenced by EU law, the “sovereign” act of legislating to withdraw notwithstanding. However, while this argument draws upon points that have been made in much contemporary governance literature,<sup>13</sup> the subsequent analysis of fundamental rights and devolution reveals how orthodoxy can still have limiting effects. This is a point that goes very much to the heart of debates about the common law constitution, where legal sovereignty has sometimes been said to be a judge-made doctrine that can be modified in the light of changing legal and political realities.<sup>14</sup> While others have cautioned that it may be unhelpful for the courts to modify the doctrine to facilitate common law review of Acts of the Westminster Parliament<sup>15</sup>, it will be argued that an unquestioning acceptance of the doctrine in the context of devolution may equally be unhelpful. This, again, is a comment that centres upon *Miller*, where the Supreme Court’s approach to legal sovereignty was so rigid that it apparently prevented the Court from even acknowledging competing narratives about the nature of devolution. It will be suggested in the conclusion that this is where the challenges for the common law constitution may be at their most pronounced and where its idea of continuity may become a truncated one.

### EU membership and Brexit

The starting point for analysing EU membership and the common law constitution remains the Divisional Court’s ruling in *Thoburn v Sunderland City Council*.<sup>16</sup> In that case, Laws LJ famously described the European Communities Act 1972 as a “constitutional statute” that is not subject to implied repeal and which can be repealed only where the Westminster Parliament uses “express words in [a] later statute, or ... words so specific that the inference of an actual determination to effect the result contended for [is] irresistible”.<sup>17</sup> When doing so, Laws LJ explained that EU law’s

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<sup>12</sup> As regards review see, eg, *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 318, para 159, Baroness Hale; and *Re Moohan* [2014] UKSC 67, [2015] AC 901, 925, para 35, Lord Hodge. For the term “divided sovereignty” see *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 302, para 102, Lord Steyn.

<sup>13</sup> For themes see generally K Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press, 2014) and J-B Auby, *Globalisation, Law and the State* (Hart Publishing, Oxford, 2016).

<sup>14</sup> On its judicial origins see HWR Wade, ‘The Basis of Legal Sovereignty’ (1955) 13 *Cambridge Law Journal* 172. Cf J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP, 2010), esp. ch 2.

<sup>15</sup> M Elliott, ‘Beyond the European Convention: Human Rights and the Common Law’ (2015) 68 *Current Legal Problems* 85, considered below.

<sup>16</sup> *Thoburn v Sunderland CC* [2003] QB 151.

<sup>17</sup> [2003] QB 151, 187.

primacy within the domestic system is wholly contingent upon the European Communities Act 1972 and that, “The fundamental legal basis of the [UK’s] relationship with the EU rests with the domestic, not the European, legal powers”.<sup>18</sup> This was, of course, an approach that took UK law closer to the position that had long been adopted by courts in other member states, and it improved upon the House of Lords’ earlier, “contractarian” reasoning in *Factortame*.<sup>19</sup> Just as significantly, the ruling suggested that the Westminster Parliament’s powers had been made subject to formal limitations as regards “constitutional statutes”, which were said to include the Human Rights Act 1998 and the devolution legislation for Scotland and Wales.<sup>20</sup>

*Thoburn*’s emphasis on domestic legal rules legitimating the primacy of EU law was returned to by the Supreme Court in its judgments in *HS2* and *Pham*.<sup>21</sup> Although neither case addressed the matter in quite so much detail as *Thoburn*, they both acknowledged the first importance of domestic legal rules and the contingent nature of EU law’s place within the domestic system. In *HS2* – an environmental law case that raised questions about a potential conflict between EU law and Article 9 of the Bill of Rights 1689 – it was said that any dispute should “be resolved by our courts as an issue arising under [UK] constitutional law” and that *Thoburn* had provided “important insights” into how this might be done.<sup>22</sup> And in *Pham*, the Supreme Court was to go even further when discussing the nature of EU citizenship rights in the context of a challenge to a decision to withdraw British citizenship from a dual British-Vietnamese national. Lord Mance, with whom Baroness Hale and Lords Neuberger and Wilson agreed, held that EU law’s citizenship guarantees are dependent upon national citizenship and that a national court must “identify the ultimate legislative authority in its jurisdiction according to the relevant rule of recognition ... unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed”.<sup>23</sup> His Lordship added that a domestic court would face a “particular dilemma” were the Court of Justice to exceed its jurisdictional boundaries on a matter such as citizenship and that such disputes might be avoided by “all concerned [acting] with mutual respect and with caution in areas where member states’ constitutional identity is or may be engaged”.<sup>24</sup>

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<sup>18</sup> [2003] QB 151, 189.

<sup>19</sup> *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603, 658, Lord Bridge, analysed in P Craig, ‘Britain in the European Union’ in J Jowell, D Oliver and C O’Cinneide (eds), *The Changing Constitution* 8th edn (Oxford: Oxford University Press, 2015), ch 4, at p 117. For the position in other member states see A Dyevre, ‘European Integration and national courts: defending sovereignty under institutional constraints?’ (2013) 9 *EuConst* 139.

<sup>20</sup> [2003] QB 151, 186; and M Elliott, ‘Embracing “Constitutional” Legislation: Towards Fundamental Law?’ (2003) 54 *Northern Ireland Legal Quarterly* 25. On the potential scope of constitutional statutes see F Ahmed and A Perry, ‘Constitutional Statutes’ (2017) 37 *Oxford Journal of Legal Studies* 461 and T Muinzer, ‘Is the Climate Change Act 2008 a “Constitutional Statute”?’ (2018) 24 *European Public Law*, forthcoming.

<sup>21</sup> *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 and *Pham v Secretary of State for Home Department* [2015] UKSC 19, [2015] 1 WLR 1591.

<sup>22</sup> [2014] UKSC 3, [2014] 1 WLR 324, 349, para 79, Lord Reed, and [2014] 1 WLR 324, 382-3, para 208, Lords Mance and Neuberger. For commentary see P Craig, ‘Constitutionalising Constitutional Law: HS2’ (2014) *Public Law* 373.

<sup>23</sup> [2015] UKSC 19, [2015] 1 WLR 1591, 1617, para 80.

<sup>24</sup> [2015] UKSC 19, [2015] 1 WLR 1591, 1620-1621, paras 90-91.

Judicial reasoning of this kind has long been central to the inter-court tensions in the EU that were referred to above.<sup>25</sup> While the most prominent instances of tension have concerned national fundamental rights standards, there have also been cases that have addressed wider themes of national constitutional identity of the kind mentioned in *Pham*. *HS2* may well be a case that also falls into this latter category, at least in so far as it addressed the nature and significance of representative democracy in the Westminster Parliament. The issue of representation had arisen when a challenge was made to the government's decision to use the hybrid bill procedure in Parliament to obtain planning permission for a high-speed rail development in England. The claimants had contended that the proposed procedure could not guarantee public participation in the planning process to the standard required by EU environmental law because of, among other things, party political allegiances, the whip system, and the volume of material that MPs would be required to consider before voting.<sup>26</sup> This is where the case gave rise to a potential inter-order conflict, as the Supreme Court noted that Article 9 of the Bill of Rights 1689 may have precluded it from even considering whether the hybrid bill procedure would comply with EU law. However, it was ultimately decided on the facts that such any conflict with EU law could be avoided because the hybrid bill procedure would not, in any event, result in any breach of EU law. Lord Reed developed the point in the most detail in a judgment that emphasised that there was "nothing in the case law of the Court of Justice to suggest that the influence of parliamentary parties, or Government, over voting in national legislatures" is incompatible with EU law.<sup>27</sup> Noting how UK law and EU law both recognise political parties as playing a legitimate role in decision-making on matters of public interest, his Lordship considered that it was right that Parliament should have been given a primary decision-making role in relation to HS2 as "a matter of national political significance".<sup>28</sup> This thus positioned representative democracy as a defining feature of UK constitutional identity in circumstances that allowed the Supreme Court to avoid the question whether it could be required, by EU law, to scrutinise Parliament's internal workings. Had the Court been required to answer the question, it is clear that it would have done so exclusively on the basis of domestic constitutional principles.<sup>29</sup>

The subsequent *Miller* litigation centred on the term "constitutional requirements" and the relationship between the UK's (representative) legislature and the executive in the context of EU withdrawal.<sup>30</sup> The term is now famously found in Article 50 TEU, which provides:

"(1) Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements.

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<sup>25</sup> N 11 and text.

<sup>26</sup> Viz, in article 6 of Parliament and Council Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

<sup>27</sup> [2014] UKSC 3, [2014] 1 WLR 324, 355, para 101.

<sup>28</sup> [2014] UKSC 3, [2014] 1 WLR 324, 357, para 108.

<sup>29</sup> [2014] UKSC 3, [2014] 1 WLR 324, 349, paras 78-9, Lord Reed, and [2014] 1 WLR 324, 381-3, paras 202-208, Lords Mance and Neuberger.

<sup>30</sup> Literature on the case is now voluminous. See, eg, M Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76 *Cambridge Law Journal* 257; the 'Brexit Special Extra Issue' of *Public Law* (2017); and M Elliott, J Williams, and A Young (eds), *The Constitution After Miller* (Hart Publishing, Oxford, 2018).

(2) A member state which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union ... It shall be concluded on behalf of the Union by the Council, acting by qualified majority, after obtaining the consent of the European Parliament.

(3) The Treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the member state concerned, unanimously decides to extend this period”.<sup>31</sup>

The central question in the case was deceptively simple: whether the UK government could rely upon the prerogative treaty-making powers to provide notification of withdrawal in the light of the UK’s referendum of 23 June 2016 – which had been held under the European Union Referendum Act 2015 – or whether a further Act of Parliament was required to authorise notification. In holding that a further Act of Parliament was required, the Supreme Court began by confirming the well-established rule that prerogative powers cannot generally be used to change statute law or the common law, or to remove rights from individuals.<sup>32</sup> While the government had argued that such limitations did not apply because the case concerned only the narrow prerogative power to withdraw from international treaties, the Supreme Court did not consider that the exercise of the power would have those limited effects. In reaching that conclusion, the Court was influenced by the assumption that, once notification is given under Article 50(2) TEU, it cannot be rescinded and must inevitably lead to withdrawal in accordance with the wider terms of Article 50 TEU.<sup>33</sup> For the Court, this meant that notification would have unavoidable consequences in domestic law in the sense that the Treaties would cease to apply once the timelines within Article 50(3) TEU had expired, irrespective of what Parliament may choose to do after notification. As those Treaties had effect in UK law under the terms of the European Communities Act 1972 – which had “constitutional characteristics” and had “constituted EU law as an entirely new, independent and overriding source of domestic law”<sup>34</sup> – it followed that only the Westminster Parliament could authorise withdrawal. This was all the more so given that EU law guarantees a range of rights. While the Court here accepted that the content of such rights could change as EU law itself changes, it did not accept that they could be negated by “ministers unilaterally deciding that the United Kingdom should withdraw from the EU Treaties”.<sup>35</sup> Nor did the Court accept that ministers could be said to have acquired a power of notification under the European Union Referendum Act 2015: that Act was held to be silent on the legal effects of a “leave” vote and something express was required.<sup>36</sup>

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<sup>31</sup> On Article 50 TEU see, too, *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469, [2017] QB 226.

<sup>32</sup> [2017] UKSC 5, [2018] AC 61, 136-143, paras 34-59.

<sup>33</sup> [2017] UKSC 5, [2018] AC 61, 134 (at para 26) & 153 (at para 94).

<sup>34</sup> [2017] UKSC 5, [2018] AC 61, 145 (at para 67) & 148 (at para 80).

<sup>35</sup> [2017] UKSC 5, [2018] AC 61, 150, para 83.

<sup>36</sup> [2017] UKSC 5, [2018] AC 61, 158-160, paras 116-125.

The Supreme Court's understanding that the European Communities Act 1972 had constituted EU law as a "source of domestic law" deserves close attention, as it touches upon the complications – and, indeed, the potential contradictions – with withdrawal. Certainly, the ruling envisaged withdrawal as unremarkable in so far as UK law's fundamental rule of recognition had been unaffected by EU membership, meaning that the sovereign Parliament was as free to legislate to end EU membership as it had been to legislate to give effect to it.<sup>37</sup> However, while this complemented the essential reasoning in *Thoburn*, *Pham*, and *HS2*, the Court also made it clear that EU law, as a source of law, is itself able to impose obligations under the European Communities Act 1972 and that "in the many areas of EU competence which are subject to majority decision, the approval of the United Kingdom is not required for its legislation to take effect domestically".<sup>38</sup> While this point was most immediately relevant to the finding that the prerogative could not be used to displace EU law as source of law, it also highlighted how far some contemporary law-making processes have moved beyond direct and immediate sovereign control. This, in turn, is a point that is central to some of the literature that was noted above, which recognises not just that different legal orders have their own internal points of legitimation, but also that they have multiple – and unavoidable – points of intersection with one another.<sup>39</sup> On this reading, EU withdrawal is possible, but more as a formal exercise of sovereign power rather than something that will wholly diminish EU law's influence within the domestic system.

Some of the complexities of withdrawal have since been seen in the European Union (Withdrawal) Bill which will be complemented by a range of Bills in the specific areas of customs, trade, immigration, fisheries, agriculture, nuclear safeguards and international sanctions.<sup>40</sup> While the final content of the European Union (Withdrawal) Bill is not yet known – multiple amendments have been tabled as the Bill has progressed through Parliament – it seems that it will provide for three main outcomes. The first is the repeal of the European Communities Act 1972 on "exit day", which will bring to an end a wide-range of treaty obligations including free movement, observance of the Charter of Fundamental Rights of the European Union, and adherence to the jurisdiction of the Court of Justice.<sup>41</sup> The second is the retention, in force, of a wide range of EU law measures which will thereafter be known as "retained EU law" and which will be subject to the exclusive jurisdiction of the UK courts.<sup>42</sup> This approach has apparently been preferred for reasons of legal certainty, although leading members of the judiciary have expressed concern that some of the wording in the Bill has the potential to politicise the courts.<sup>43</sup> This is really a criticism of clause 5, which provides that the

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<sup>37</sup> [2017] UKSC 5, [2018] AC 61, 143, para 60.

<sup>38</sup> [2017] UKSC 5, [2018] AC 61, 143, para 61.

<sup>39</sup> N 13 above. See also N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317. Compare M Loughlin, 'Constitutional Pluralism: An Oxymoron' (2014) 3 *Global Constitutionalism* 9.

<sup>40</sup> See the text of the Queen's Speech 2017, at <https://www.gov.uk/government/speeches/queens-speech-2017>; and *The United Kingdom's exit from and new partnership with the European Union*, 2017, Cmnd 9417, and *Legislating for the United Kingdom's Withdrawal from the European Union* 2017, Cmnd 9446.

<sup>41</sup> Cls 1 and 5.

<sup>42</sup> Cls 2-6.



supremacy doctrine will not apply to any enactment or rule of law passed or made on or after exit day, unless the application of the doctrine would be “consistent with the intention of the modification”. The third outcome is the possibility for the body of “retained EU law” to be changed incrementally in accordance with domestic political preferences, whether at the central and/or the devolved levels. This is an issue that has given since rise to significant difficulties in the context of relations between the UK and devolved governments – a point that is returned to, below, when considering “devolution”. However, at this stage, it need only be noted that the Bill envisages an apparently wide use of delegated legislation, with Henry VIII clauses offering an apparently flexible (if controversial) means for amending the statute book.<sup>44</sup>

Plainly, the promulgation of the European Union (Withdrawal) Bill and stand-alone Bills in respect of trade etc. will represent the formal exercise of sovereignty that was mentioned above. However, it is the proposed retention of large areas of EU law and a role for the supremacy doctrine – essentially the case law of the Court of Justice – that reveals the potential fiction of withdrawal. The point here is that the UK courts will be required to work within a constitutional reality that will position them outside the European Union but where statute will maintain a link to Court of Justice case law that pre- and post-dates withdrawal. While it is possible that the UK courts will seek to draw a bright line distinction between Court of Justice case law and their own post-Brexit rulings – there are some earlier domestic authorities that would support such a distinction<sup>45</sup> – they may equally adopt a fluid approach to the use of the Court of Justice’s case law, whether it pre- or post-dates Brexit. For instance, in the field of non-discrimination law – where EU law currently underpins domestic measures on, among other things, gender, sexual orientation, race and religion<sup>46</sup> – there may be pragmatic and prudential reasons for regarding post-Brexit Court of Justice rulings as (strong) persuasive authorities. Such reasons start with the fact that courts and tribunals may be faced with questions about the historical and purposive interpretation of the new “UK” measures, where it may be false to attempt to answer such questions without considering the Court of Justice’s developing case law on EU law’s (anterior) regime. Also potentially relevant is the fact that questions about the interpretation of anti-discrimination measures often overlap with questions about Article 14 ECHR, where Court of Justice case law may assist UK courts as they resolve disputes under the Human Rights Act 1998.<sup>47</sup>

The scope for overlap with Court of Justice case law can also be seen in the field of the environment, where domestic law can coincide both with EU law and international law obligations.<sup>48</sup> The most prominent example is the Aarhus Convention that has been signed by both the UK and EU,

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<sup>43</sup> ‘Lady Hale outlines concerns with language of Brexit bill’ Irish Legal News, 22 March 2018, available at <http://www.irishlegal.com/11809/lady-hale-outlines-concerns-language-brexit-bill/>.

<sup>44</sup> Cls 7-11. For some of the attendant issues see, *The Great Repeal Bill and Delegated Powers*, 2017, HL Paper 123.

<sup>45</sup> Eg, *R v Ministry of Agriculture, Fisheries and Food, ex p First City Trading Ltd* [1997] 1 CMLR 250 (cf *R v Secretary of State for the Home Department, ex p McQuillan* [1995] 4 All ER 400). See further G Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration* (Hart Publishing, Oxford, 2002).

<sup>46</sup> For the applicable regimes see K Monaghan, *Equality Law* (Oxford University Press, 2<sup>nd</sup> ed, 2013).

<sup>47</sup> For overlap, albeit in a case in which the court did not need to go on to consider Article 14 ECHR, see *Walker v Innospec Ltd* [2017] UKSC, [2017] 1 ICR 1077, para 16.

<sup>48</sup> See G Anthony, ‘Public Interest and the Three Dimensions of Judicial Review’ (2013) 64 *Northern Ireland Legal Quarterly* 125.

which imposes public interest obligations in relation to access to information, public participation in decision-making, and access to justice.<sup>49</sup> The Aarhus Convention has effect in UK law primarily under legislation that implements a range of corresponding EU Directives and in respect of which the Court of Justice has already delivered a number of significant rulings.<sup>50</sup> One such ruling was in the *Edwards* case on protective costs orders, which followed a Supreme Court reference on the meaning of “prohibitively expensive” for the purposes of the Aarhus Convention’s requirements about access to justice.<sup>51</sup> The subsequent ruling of the Court of Justice was relevant not just to the UK’s obligations under EU law but also under the Aarhus Convention itself, where a Compliance Committee can assess complaints about breaches by a signatory party.<sup>52</sup> While it would plainly be overly simplistic to expect that the UK courts will always follow future Court of Justice rulings on the Aarhus Convention – aspects of the EU legal order itself have been said to breach the Convention<sup>53</sup> – a failure to consider the Court of Justice’s post-Brexit case law may equally be misguided. The historical setting to the UK’s post-Brexit regime will surely be such that the pursuit of a common approach should be preferred.

Of course, discrimination law and environmental law provide merely two examples of areas in which there may a post-Brexit overlap of norms, with data protection, consumer protection, and competition policy providing some others. However, for the common law constitution, even these limited examples provide some insight into the nature of the challenge that the courts will face once “withdrawal” has occurred. In short, the courts will be required to mediate the residual effects of EU law and to decide how far UK law’s rule of recognition can truly have the effects that are attributed to it. This, again, is the essential point arising from literature on the interaction of legal orders, which accepts that courts (both national and international) can observe internal points of legitimation but also that they must moderate unavoidable points of intersection with “external” norms.<sup>54</sup> While *Miller* has, on the one hand, returned the common law to a traditional model of Diceyan sovereignty – a point that will be discussed more fully below in relation to fundamental rights and devolution – its analysis of EU law perhaps also casts doubt on the utility of binary distinctions between “internal” and “external” law. It will be suggested in the conclusion that, if such doubt persists, it may well mean that the common law constitution will continue to draw influence from EU law where there is a coincidence of norms and values.

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<sup>49</sup> The text of the Convention is available at <https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention.html>.

<sup>50</sup> On the legal framework in domestic law see C Banner (ed), *The Aarhus Convention: A Guide for UK Lawyers* (Hart Publishing, Oxford, 2015), chs 2-5.

<sup>51</sup> *R (Edwards) v Environment Agency (No 2)* [2010] UKSC 57, [2011] 1 WLR 79; Case C-260/11, *R (Edwards) v Environment Agency* [2013] 1 WLR 2914; and article 10a of Council Directive 85/337/EEC and article 15a of Council Directive 96/61/EC, as read with article 9.4 of the Aarhus Convention. And see, subsequently, *R (Edwards) v Environment Agency* [2013] UKSC 78, [2014] 1 WLR 55.

<sup>52</sup> On the Committee see <http://www.unece.org/env/pp/ccbackground.html>; and M Macchia, ‘Legality: The Aarhus Convention and the Compliance Committee’ in S Cassese et al (eds), *Global Administrative Law: The Casebook* (Institute for International Law and Justice, NYU, 3<sup>rd</sup> ed, 2012), at III.A.1.

<sup>53</sup> See JA Campos, ‘EU violating the Aarhus Convention: Public right to access to justice not yet assured’ at <https://www.clientearth.org/eu-violating-aarhus-convention-public-right-access-justice-yet-assured/>.

<sup>54</sup> See n 13 above.

## Common law fundamental rights standards

The corresponding role that fundamental rights standards play within the common law constitution can best be understood, at least in the first instance, by drawing parallels with the effects of “common law constitutional statutes”. Although it has been doubted whether common law fundamental rights standards have a constitutional quality,<sup>55</sup> it is axiomatic that the courts offer protection to, amongst others, the right to life, freedom of expression, the right to liberty, and the right of access to justice.<sup>56</sup> The cross-over with common law constitutional statutes comes in the manner in which the courts protect the rights. While the courts have said that there may be circumstances in which they would reject an Act of the Westminster Parliament that was contrary to some fundamental value of the common law<sup>57</sup> – pronouncements that have plainly challenged orthodoxy – they have thus far preferred formal limitations of the kind that govern the repeal of constitutional statutes. In reality, this has taken form in a legality principle that requires the Westminster Parliament to use either express words to override rights or words which have that effect by necessary implication, as “(f)undamental rights cannot be overridden by general or ambiguous words ... the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual”.<sup>58</sup> The courts’ approach here has also been aligned to a principle of “anxious scrutiny” whereby administrative choices that interfere with common law rights can be subject to a form of proportionality review.<sup>59</sup>

Such developments in the law have been shaped by a range of factors that illustrate, again, how national, European, and international legal standards can intersect with one another. Certainly, from an historical perspective, it can be said that the common law has existed on its own continuum so that, for instance, its right to a fair hearing has been able to evolve and accommodate the demands of the constitutional right of access to justice.<sup>60</sup> However, in making such adaptations, whether they relate to access to justice or to other rights, the common law has been influenced by external standards that have included, most prominently, the ECHR.<sup>61</sup> While the courts have not always followed every ruling of the European Court of Human Rights – the structure of the Human Rights Act 1998 is such that it facilitates “constructive dialogue” with the Strasbourg Court<sup>62</sup> – they have

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<sup>55</sup> See B Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press, 2013), ch 1; and, eg, *Watkins v Home Office* [2006] UKHL 17, [2006] 2 AC 395, 411ff, Lord Rodger.

<sup>56</sup> See, respectively, *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696; *R (Lumba) v Home Secretary* [2011] UKSC 12, [2012] 1 AC 245; and *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>57</sup> N 12 above.

<sup>58</sup> *R v Home Secretary, ex p Simms* [2000] 2 AC 115, 131, Lord Hoffmann; and, eg, *Ahmed v HM Treasury* [2010] UKSC 2 & 5, [2010] 2 AC 534 and *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>59</sup> *Pham v Secretary of State for Home Department* [2015] UKSC 19, [2015] 1 WLR 1591, 1628-1630, Lord Reed.

<sup>60</sup> P Leyland and G Anthony, *Textbook on Administrative Law* (Oxford University Press, 8<sup>th</sup> ed, 2016) ch 17.

<sup>61</sup> See M Amos, *Human Rights Law* (Hart Publishing, Oxford, 2<sup>nd</sup> ed, 2014); and T Hickman, *Public Law After the Human Rights Act* (Hart Publishing, Oxford, 2010).

allowed ECHR case law to permeate the common law and even to give rise to new causes of action.<sup>63</sup> In some instances, the courts have also considered the reach of rights with reference to the Charter of Fundamental Rights of the European Union, which has been referenced both on a free-standing basis and as a correlate of the ECHR.<sup>64</sup> The courts have, in addition, had regard for unincorporated international law, where treaties have been used as aids to statutory interpretation and to the development of the common law, and where customary international law has been said to exist as a part of the common law itself.<sup>65</sup>

At one level, the bare fact of Brexit should do little to complicate this overlap of standards. While the European Union (Withdrawal) Bill envisages that the Charter of Fundamental Rights will no longer be enforceable in the UK courts<sup>66</sup> – though it could presumably still have an impact through “persuasive” rulings of the Court of Justice – there is nothing to suggest that other changes to the UK’s human rights framework are imminent. At its most obvious, this is a point about the Human Rights Act 1998, where pre-Brexit proposals for amendment (or even repeal) of the Act are no longer being prioritised and would, in any event, now encounter questions about the balance between legislative and executive power.<sup>67</sup> However, there is also a level at which the implications of withdrawal could become more complex, largely because *Miller* has embedded and unsettled some earlier case law. For instance, one aspect of the case law that has been embedded is the legality principle that was outlined above, which was discussed in *Miller* in relation to the effects of the European Communities Act 1972. The government had here argued that the 1972 Act provided for the withdrawal of EU law rights because it gives effect to whatever EU obligations the UK has at any particular moment – obligations which, post-notification, would ultimately cease to exist. While the Supreme Court accepted that the 1972 Act could have included a provision that would have enabled ministers to initiate withdrawal and to affect rights in that way, it held that no such provision had been enacted and that “Parliament [had not] ‘squarely confront[ed]’ the notion that it was clothing ministers with the far-reaching and anomalous right to use a treaty-making power to remove an

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<sup>62</sup> *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, 125, Lord Neuberger; and, eg, *Poshteh v Kensington and Chelsea LBC* [2017] UKSC 36, [2017] AC 624. On the idea of inter-institutional dialogue see A Young, *Democratic Dialogue and the Constitution* (Oxford, Oxford University Press, 2017), esp ch 8.

<sup>63</sup> Eg, misuse of private information: see *Campbell v Mirror Group Newspapers* [2004] UKHL 22, [2004] 2 AC 457; and *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081.

<sup>64</sup> Eg, *Rugby Football Union v Viagogo Ltd* [2012] UKSC 55, [2012] 1 WLR 3333; and *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271.

<sup>65</sup> On treaties see, eg, *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, 993, para 27, Lord Hoffmann; and on customary international law see, eg, *Keyu v Secretary of State for Foreign Affairs* [2015] UKSC 69, [2016] AC 1355, 1411-1414, Lord Mance.

<sup>66</sup> Cl 5(4).

<sup>67</sup> For some of the proposals see, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’, available at [https://www.conservatives.com/~media/files/.../human\\_rights.pdf](https://www.conservatives.com/~media/files/.../human_rights.pdf). On the current position see, ‘Conservative manifesto: Theresa May announces UK will remain part of the European Convention of Human Rights’, *The Independent*, 18 May 2017, available at <https://www.independent.co.uk/news/uk/politics/conservative-manifesto-uk-echr-european-convention-human-rights-leave-eu-next-parliament-election-a7742436.html>. On the constitutional questions see H Mountfield QC, ‘Beyond Brexit: What does Miller Mean for the UK’s Power to Make and Break International Obligations?’ [2017] 22 *Judicial Review* 143.

important source of domestic law and important domestic rights”.<sup>68</sup> On the facts of *Miller*, this was significant as the principle had acted as a brake on a claimed executive power and had returned to Parliament the question of whether the process of withdrawal should commence. It was an approach that may yet also be significant in relation to the European Union (Withdrawal) Bill’s retention of EU law/UK law rights: should the Bill’s envisaged Henry VIII powers be used to repeal any of the rights, *Miller*’s emphasis on the legality principle may mean that the courts would be willing to scrutinise closely the use of such powers.<sup>69</sup>

The feature of the ruling that has unsettled earlier case law is the reassertion of Parliamentary sovereignty as UK law’s ultimate rule of recognition. While it is true that the legality principle imposes some formal limits on Parliament’s legislative powers, *Miller* has seemingly reaffirmed that there are no substantive limits to those powers, including as they relate to rights.<sup>70</sup> This is a return to orthodoxy that can be contrasted with earlier judicial comments about the scope for review of Acts of Parliament, and it may also have implications for case law that had emphasised the importance of common law rights even in the era of the Human Rights Act 1998.<sup>71</sup> The case law in question had coincided with pre-Brexit debates about the possible repeal of the Human Rights Act 1998, and it contained something of a pre-emptive hint about the common law’s capacity to provide for its own continuous protection of rights.<sup>72</sup> Marched to its logical conclusion, this would presumably have required the courts to consider again whether to review Acts of Parliament with reference to the common law, where access to justice and voting rights had previously been cited as possible grounds for judicial intervention.<sup>73</sup> However, with *Miller*, any more intrusive common law role may now be less likely, and the courts may be willing to pursue only the “weak form” protection of rights that is associated with an *Anisminic* interpretation of statute.<sup>74</sup> Even then, the pervasive influence of orthodoxy is such that recourse to that interpretive technique may exist more as an exception rather than a rule.<sup>75</sup>

All of this begs the question whether it is, in any event, right that the courts should use the common law to review Acts of the Westminster Parliament. In an article published in 2015, Mark Elliott addressed that question as part of a wider analysis of how far common law protection of rights

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<sup>68</sup> [2017] UKSC 5, [2018] AC 61, 151, para 87, citing Lord Hoffmann in *Simms*, n 58 above.

<sup>69</sup> For a forerunner see *R (Public Law Project) v Secretary of State for Justice* [2016] UKSC 39, [2016] AC 1531.

<sup>70</sup> On the difference between formal and substantive limits see Elliott n 20 above.

<sup>71</sup> Notably in *Re Reilly’s Application* [2013] UKSC 61, [2014] AC 1115; *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455; and *A v BBC* [2014] UKSC 25, [2015] AC 588.

<sup>72</sup> See further M Elliott, ‘Beyond the European Convention: Human Rights and the Common Law’ (2015) 68 *Current Legal Problems* 85, esp. at 92-95.

<sup>73</sup> On access to justice see *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 318, para 159, Baroness Hale; and on voting rights see *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901, 925, para 35, Lord Hodge.

<sup>74</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. On “weak form” protection see S Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013). Compare TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press, 2013), esp. chs 4-5.

<sup>75</sup> For a recent survey of the authorities see *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868, [2018] HRLR 3, on appeal at the time of writing.

could replace that which is provided for by the Human Rights Act 1998.<sup>76</sup> His overall conclusion was that the common law would not easily fill any void left by the repeal of the Human Rights Act 1998, which has “served to normalize the notion of judicial review of primary legislation: rendering an interpretation pursuant to section 3 of the HRA or issuing a declaration of incompatibility under section 4 are steps which, while relatively rare, are unexceptional”.<sup>77</sup> For Elliott, it was certainly possible that the common law could itself engage in review of Acts of Parliament, but he noted that such review would be likely to have a narrow scope given existing judicial comments, and also that it may result in a “constitutional crisis”.<sup>78</sup> This was a reference to the co-existence of different institutional understandings of sovereignty – legal and political – where Elliott commented that the possibility, but not the practice, of common law review was “a constitutional feature ... that promotes comity that serves to discourage both sides from trespassing beyond the brink”.<sup>79</sup> However, while such comments help to place examples of legislative action in context – for instance, when an Immigration Bill was changed after critical, extra-judicial commentary<sup>80</sup> – they also raise questions about how far the lessons of rights remain transferrable to other areas of the common law constitution. This is most obviously true of devolution, where different institutional understandings of sovereignty abound, but where *Miller* adopted a singular, unitary approach to the concept in its legal form.<sup>81</sup> It is to that aspect of the ruling that this article now turns.

## Devolution

The first point that should be made about devolution is that the matter of sovereignty had previously been linked to EU membership and the (then perceived) diminution of the Westminster Parliament’s powers. This, famously, is the realm of Lord Steyn’s opinion in *Jackson*, where his Lordship observed that the Westminster Parliament’s powers had been limited by the demands of EU law and that, “The settlement contained in the Scotland Act 1998 also points to a divided sovereignty [within the UK] ... The classic account ... of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern [UK]”.<sup>82</sup> In historical terms, Lord Steyn’s comments were at one with the pronouncements of some Scottish judges<sup>83</sup>, although, from a contemporaneous

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<sup>76</sup> N 72 above.

<sup>77</sup> *Ibid*, at 114.

<sup>78</sup> *Ibid*, at 114.

<sup>79</sup> *Ibid*, at 113. See, too, M Elliott, ‘The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective’ in J Jowell, D Oliver and C O’Cinneide (eds), *The Changing Constitution* (Oxford University Press, 8<sup>th</sup> ed, 2015), ch 2.

<sup>80</sup> See ‘Lord Steyn’s Comments from the *Lester and Pannick* Book Launch’ [2004] 9 *Judicial Review* 103.

<sup>81</sup> On differing conceptions see D Feldman, ‘None, one or several? Perspectives on the UK’s Constitution(s)’ (2005) 64 *Cambridge Law Journal* 329, 346 ff.

<sup>82</sup> *Jackson v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 302, para [102].

<sup>83</sup> See, eg, *MacCormick v Lord Advocate* 1953 SC 396, 411, Lord Cooper: “[T]he principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law”.

perspective, they perhaps failed to acknowledge some of the more orthodox features of the Scotland Act 1998 and, by extension, the devolution legislation for Northern Ireland and Wales. For instance, while devolution in the UK was partly intended to create a space for national (and nationalistic) preferences,<sup>84</sup> each of the devolution Acts contained provisions that reasserted the final law-making power of the Westminster Parliament.<sup>85</sup> This ultimately tied devolution's asymmetry to a centralised model of sovereignty and, in so doing, it defined devolution as different in form from federalism.<sup>86</sup> It also provided something of a contradictory backdrop to legislative changes that were to be noted in *Miller*, viz. statutory recognition of the "permanence" of the devolved institutions in Scotland and Wales and of the "Sewel convention" whereby Westminster will not normally legislate with regard to devolved matters without the consent of the devolved legislature(s).<sup>87</sup>

Of course, the implications of devolution had also been addressed in a number of other pre-*Miller* cases. For instance, in *Thoburn*, noted above, Laws LJ identified the Scotland Act 1998 and the Government of Wales Act 1998 as "constitutional statutes"<sup>88</sup>; while, in *Robinson*, Lord Bingham described the Northern Ireland Act 1998 as a "constitution" that should be interpreted "generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody".<sup>89</sup> Although the Supreme Court later ruled that an expansive interpretation of the various devolution Acts would not always be pursued,<sup>90</sup> *Robinson* had made it clear, albeit on facts arising from the Northern Ireland peace process, that devolution could attract inventive judicial reasoning.<sup>91</sup> Moreover, in the *Axa* case, the Supreme Court considered the question of how closely the courts should scrutinise the choices of the devolved legislatures, and ruled that restraint would often be

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<sup>84</sup> S Tierney, 'Devolution in historical and political context' in M Elliott and R Thomas, *Public Law* (Oxford University Press, 3<sup>rd</sup> ed, 2017), p 332.

<sup>85</sup> Northern Ireland Act 1998, s 5(6); Scotland Act 1998, s 28(7); Government of Wales Act 2006, s 107(5).

<sup>86</sup> For the differences between the two see B Hadfield, 'The Foundations of Review, Devolved Power and Delegated Power' in C Forsyth (eds) n 2 above, p193, 194.

<sup>87</sup> Scotland Act 2016, ss 1-2, and Wales Act 2017, ss 1-2. The position in Northern Ireland continues to be set out in paragraph 14 of the Memorandum of Understanding between the UK government and the devolved governments, as read with Devolution Guidance Note 8 on 'Post-Devolution Legislation Affecting Northern Ireland. The Memorandum is available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316157/MoU\\_between\\_the\\_UK\\_and\\_the\\_Devolved\\_Administrations.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf); the Devolution Guidance Note at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60983/post-devolution-primary-ni.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60983/post-devolution-primary-ni.pdf).

<sup>88</sup> *Thoburn v Sunderland CC* [2003] QB 151, 186.

<sup>89</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390, 398, para 11. See also Lord Hoffmann's comments at [2002] NI 390, 402, para 25.

<sup>90</sup> *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53, [2013] 1 AC 792 and *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, (2013) SC (UKSC) 153. See too, eg, *Re Agriculture Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622.

<sup>91</sup> For commentary on *Robinson* see J Morison and G Anthony, 'The Judicial Role in the New Northern Ireland: Constitutional Litigation and Transition' (2009) 21 *European Review of Public Law* 1219, at 1226-1229.

merited.<sup>92</sup> The challenge here was to an Act of the Scottish Parliament that allowed individuals to sue for harms suffered whilst working in Scotland's heavy industries, but, in dismissing the challenge, the Supreme Court drew attention to the Scottish Parliament's democratic legitimacy and mandate.<sup>93</sup> While Lords Hope and Reed stated that the Scottish Parliament is not legally sovereign, they emphasised that it is a "self-standing democratically elected legislature"<sup>94</sup> and that, "(w)ithin the limits set by the [Scotland Act] ... its power to legislate is as ample as it could possibly be".<sup>95</sup> In the context of that case, it was thus held that there were no grounds upon which to intervene and, even in other cases where Scottish legislation has been found to be *ultra vires*, the Supreme Court has sometimes made orders that have allowed the Scottish Parliament to take steps to remedy the legislation.<sup>96</sup> The importance of devolved legislative choices has also been acknowledged in a more recent case where it was held that it had been lawful for a government Minister in England not just to have regard for Northern Ireland legislation when formulating policy but also to decide not to formulate policy in a way that might undermine that legislation.<sup>97</sup>

The closest that the courts have come to building upon Lord Steyn's comments about divided sovereignty was in *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*.<sup>98</sup> This case arose when the Counsel General referred to the Supreme Court the legality of a Bill that would have allowed the Welsh Ministers to recover from employers and insurers some of the costs of treating persons for work-related illnesses on the National Health Service. One of the questions was whether the Bill constituted a disproportionate interference with rights under Article 1 Protocol 1 ECHR, where Lord Mance (for the majority) held that it did. In doing so, his Lordship accepted that he should give "weight" to the Welsh Assembly's public interest choice in passing the Bill<sup>99</sup>, but he considered that he could form a view on its proportionality without addressing the "difficult" question whether "there is a relevant distinction between cases concerning primary legislation by the United Kingdom Parliament and other legislative and executive decisions".<sup>100</sup> In contrast, Lord Thomas, for the minority, examined this constitutional question in some detail, and was of the view that "great weight" should be given to the public interest choice of the Welsh Assembly. Stating that he "would find it difficult to make any logical distinction in the context of the United Kingdom's devolved constitutional structure between [the devolved] legislatures and the United Kingdom Parliament in

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<sup>92</sup> *Axa General Insurance v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868.

<sup>93</sup> The legislation in question was the Damages (Asbestos-related Conditions) (Scotland) Act 2009.

<sup>94</sup> [2012] 1 AC 868, 911, para 46, Lord Hope.

<sup>95</sup> [2012] 1 AC 868, 944, para 146, Lord Reed.

<sup>96</sup> See *Salvesen v Riddell* [2013] UKSC 22, (2013) SC (UKSC) 236 and *Christian Institute v Lord Advocate* [2016] UKSC 51, 2016 SLT 805, as read with s 102 of the Scotland Act 1998.

<sup>97</sup> *R (A) v Secretary of State for Health* [2017] UKSC 41, [2017] 1 WLR 2492. On the relevance of the devolution arrangements to executive decision-making see, too, *R (Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [2015] 3 All ER 1, 33, para 78, Lord Neuberger.

<sup>98</sup> [2015] UKSC 3, [2015] AC 1016.

<sup>99</sup> [2015] UKSC 3, [2015] AC 1016, 1046, para 67.

<sup>100</sup> [2015] UKSC 3, [2015] AC 1016, 1041, para 56.



according weight to the evaluation of the different choices and interests in respect of matters which are within the primary competence of the legislatures”,<sup>101</sup> his Lordship concluded that he could not “see why in principle the United Kingdom Parliament in making legislative choices in relation to England (in relation to matters such as the funding of the NHS in England) is to be accorded a status which commands greater weight than would be accorded to the Scottish Parliament and the Northern Ireland and Welsh Assemblies in relation respectively to Scotland, Northern Ireland and Wales”.<sup>102</sup> On one reading, this was an approach that had perhaps started to equate devolution with a nascent federalism in the UK.<sup>103</sup>

The resulting devolution question in *Miller* – which arose on a related reference from Northern Ireland<sup>104</sup> – concerned the applicability of the Sewel convention in the event that an Act of the Westminster Parliament would be required to authorise notification under Article 50 TEU.<sup>105</sup> The essence of the question was whether the UK government was legally obliged to seek the consent of the devolved legislatures for any such Act given that EU withdrawal would have the effect of expanding devolved competences.<sup>106</sup> In reality, this was a question that was being asked against the political backdrop of the UK’s different “national” votes on Brexit (Scotland and Northern Ireland having voted “remain”), and it was within that political realm that the Supreme Court held that the convention belonged. While the Court noted that “constitutional conventions ... play a fundamental role in the operation of our constitution”,<sup>107</sup> it drew a sharp distinction between matters of legal and political enforcement. When doing so, the Court acknowledged that judges could “recognise the operation of a political convention in the context of deciding a legal question” and that “the Sewel Convention has an important role in facilitating harmonious relations between the UK Parliament and the devolved legislatures”.<sup>108</sup> However, the Court equally made it clear that, “Judges ... are neither the parents nor the guardians of political conventions” and that they “cannot give legal rulings on [their] operation or scope, because those matters are determined within the political world”.<sup>109</sup> This was so notwithstanding that the convention had since been written into legislation

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<sup>101</sup> [2015] UKSC 3, [2015] AC 1016, 1059-1060, paras 118-119.

<sup>102</sup> [2015] UKSC 3, [2015] AC 1016, 1060, para 122.

<sup>103</sup> For an extra-judicial pronouncement to like effect see Lady Hale, ‘The UK Supreme Court in the UK Constitution’, 12 Oct 2012, p 23, at <https://www.supremecourt.uk/docs/speech-121012.pdf>.

<sup>104</sup> There were in fact two references from Northern Ireland: *Re Agnew* (reference by the High Court on the application of the Attorney General for Northern Ireland) and *Re McCord* (reference by the Court of Appeal for Northern Ireland). The two references raised five questions in total, but only that related to Sewel is of relevance here. On the other questions, and their disposal, see C McCrudden and D Halberstam, ‘Miller and Northern Ireland: A Critical Constitutional Response’ (2017) 8 *UK Supreme Court Yearbook* 1; and G Anthony, ‘Sovereignty, Consent, and Constitutions: The Northern Ireland References’ in Elliott *et al* (eds) n 30 above, p 181.

<sup>105</sup> See JE Khushal Murkens, ‘Mixed Messages in Bottles: the European Union, Devolution, and the Future of the Constitution’ (2017) 80 *MLR* 685.

<sup>106</sup> [2017] UKSC 5, [2018] AC 61, 161, para 130.

<sup>107</sup> [2017] UKSC 5, [2018] AC 61, 166, para 151.

<sup>108</sup> [2017] UKSC 5, [2018] AC 61, 165 (at para 146) & 166 (at para 151).

for Scotland and Wales – the nature of that legislation was said to be such that it simply recognises “the convention for what it is, namely a political convention ... and that the purpose of the legislative recognition of the convention was to entrench it as a convention”.<sup>110</sup>

The restrictive nature of the Supreme Court’s ruling on this point has plainly arrested for the time being any common law development of “divided sovereignty” and/or federalism within the UK. While the ruling does mean not that the Sewel Convention is now without relevance – the UK government is seeking consent for those aspects of the European Union (Withdrawal) Bill that relate to devolved policy areas and institutions<sup>111</sup> – it has lessened the significance of the judicial statement that were made in *Jackson* and *Medical Costs*. Indeed, in terms of the point that was made in the introduction to this article – that the reassertion of orthodoxy might create tensions within the law – this is where *Miller’s* impact may be at its most pronounced. Although it may have been unlikely that the Court would have departed from orthodoxy in relation to devolution given its earlier reliance upon that orthodoxy in relation to notification, its consideration of the Sewel convention remained bare even against that background. For instance, one query that arises from the ruling is how far judges can, in their own words, “recognise the operation of a political convention in the context of deciding a legal question” without having first formed a view about the nature and scope of the convention at hand.<sup>112</sup> While such an anterior enquiry in *Miller* might have allowed the Court to engage (either positively or negatively) with some of the comments in *Jackson* and *Medical Costs*, the Supreme Court’s bright-line distinction between law and politics apparently ended that possibility. In the event, devolution did not really feature in the judgment beyond a brief mention of the importance of the Northern Ireland peace process and a description of the Sewel convention’s evolution across intergovernmental agreements and statute.<sup>113</sup>

As with the matter of fundamental rights, this begs the question of how far the courts can, or should, seek to limit the Westminster Parliament’s powers in the devolved context. Certainly, one of the leitmotifs of the common law constitution is that the rule of recognition is a judge-made construct which may be modified in the light of evolving legal and political realities.<sup>114</sup> In *Miller*, those realities included a convention that coincided with different “national” votes on the issue of Brexit, where there was some overlap with Axa’s idea of (even a sub-sovereign) democratic legitimacy and mandate. By deciding not to create any legal space for the convention, it may well be that the Supreme Court was seeking to avoid becoming the source of a constitutional crisis that would have brought the implications of a “divided sovereignty” very much to the fore. However, it is also the case that such a constitutional crisis had already been caused by the Brexit vote, where political disagreement about the European Union (Withdrawal) Bill later led the Scottish government to indicate that it was unable to support a Sewel motion and to introduce its own devolved Withdrawal

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<sup>109</sup> [2017] UKSC 5, [2018] AC 61, 165-166, para 146.

<sup>110</sup> [2017] UKSC 5, [2018] AC 61, 166, paras 148-9.

<sup>111</sup> See paragraphs 71-72 of the Explanatory Notes to the EU (Withdrawal) Bill as brought from the House of Commons to the House of Lords on 18 January 2018 (HL Bill 79), available at <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0079/18079en.pdf>.

<sup>112</sup> Elliott, n 30 above, 276-277.

<sup>113</sup> [2017] UKSC 5, [2018] AC 61, 161 (at para 128) & 163-164 (at paras 136-139).

<sup>114</sup> See Wade n 14 above, and, eg, *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 303, para 104, Lord Hope.

Bill (which was challenged in the courts).<sup>115</sup> While it would (of course) be unrealistic to suggest that the Supreme Court could have removed the scope for political tensions around Brexit, it is not unrealistic to think that might have said more about the distribution of political power within a UK of multiple governments and electorates. By declining to do so, the Court arguably confirmed the historical truth that Diceyan sovereignty is a unionist sovereignty.<sup>116</sup>

## Conclusion

This article began by noting that Brexit represents something of a paradox for the common law constitution – while the courts have been able to rationalise the fact of EU withdrawal, they have reinvigorated a rule of recognition that will give rise to a number of tensions in the law. At its height, this emphasis on the rule of recognition perhaps means that there can no longer be any doubt about the common law constitution’s approach to the powers of the Westminster Parliament. Such doubts had taken their lead from the idea that “the rule of law ... is the ultimate controlling factor on which our constitution is based” and that there might be rights-drawn limits to what even the sovereign Parliament can achieve.<sup>117</sup> However, with *Miller* apparently making it clear that there are no such limits, it may be that the rule of law will now perform only the more restrained role that is associated with ascertaining Parliament’s (often presumed) intentions. For the courts to go further would seem to require, as Lord Bingham put it, “a major constitutional change ... which should be made only if the British people, properly informed, choose to make it”.<sup>118</sup>

Of the resulting tensions in the law, the courts may have the least difficulty in moderating the post-withdrawal relationship between the common law and EU law. One obvious reason for this is the fact that the proposed withdrawal legislation will retain linkages to EU law, thereby (on the above analysis) requiring the courts to work within that framework. But the interaction between the common law and EU law may well have another dimension that will reveal much more about the common law constitution’s future direction. This, again, is the point about the interaction of legal norms beyond formal exercises of sovereign power, where the realities of global and European governance often sit in contrast with notions of sovereignty.<sup>119</sup> While individual legal orders have internal rules of recognition as a part of that reality – hence *Miller*’s accommodation of withdrawal – it includes an unavoidable intersection of national, international and supranational norms. On this

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<sup>115</sup> The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, available at [http://www.parliament.scot/UK%20Withdrawal%20from%20the%20European%20Union%20\(Legal%20Continuity\)%20\(Scotland\)%20Bill/SPBill28S052018.pdf](http://www.parliament.scot/UK%20Withdrawal%20from%20the%20European%20Union%20(Legal%20Continuity)%20(Scotland)%20Bill/SPBill28S052018.pdf). The Welsh government has also introduced a similar Bill – the Law Derived from the European Union (Wales) Bill – which is available at <http://senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=21280>. For commentary see C McCorkindale and A McHarg, ‘Continuity and Confusion: Legislating for Brexit in Scotland and Wales (Parts I & II)’, U.K. Const. L Blog (6<sup>th</sup> and 7<sup>th</sup> Mar. 2018) (available at <https://ukconstitutionallaw.org/>).

<sup>116</sup> On Dicey’s historical influence see C McCrudden, ‘State Architecture: Subsidiarity, Devolution, Federalism and Independence’ in M Elliott and D Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge, Cambridge University Press, 2015), p 193.

<sup>117</sup> *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 304, para 107, Lord Hope.

<sup>118</sup> *The Rule of Law* (Penguin, London, 2010), p 170, noting the prospects of codified constitution.

<sup>119</sup> See Auby, n 13 above; and M Hunt, *Using Human Rights Law in English Courts* (Hart Publishing, Oxford, 1997) chs 1-3.

reasoning, a key part of the challenge for the common law constitution will be to decide how far it should remain a receptacle for external norms – EU law, human rights law – where those norms elide with values that are found in the common law. Indeed, it may well be that any process of reception should not be regarded as one way: the common law itself has long been an exporter of norms and it might usefully contribute to developments elsewhere, including at the global level.<sup>120</sup>

Inevitably, the most pressing tension will remain devolution, and this may be the factor that ultimately prompts the vote to which Lord Bingham referred. Although it appears that the devolution settlement will not be given further political consideration until the terms of Brexit have been finalised, the primary options at that time may well be either UK federalism within a codified constitution or the break-up of the Union on foot of Scottish independence and/or Irish unification.<sup>121</sup> In terms of *Miller's* law/politics divide, this is most certainly the realm of the political process, as any such options could be acted upon only with the consent of the relevant institutions and electorate(s). However, for the common law constitution, the choices that might be made would have crucial implications for its future and its reach. In short, a choice in favour of federalism would recast UK law's rule of recognition and require the courts to reason with first reference to an agreed constitutional text. While this would raise interesting questions about the relationship between the judiciary and the state and federal legislatures (including in rights cases), it could be expected that the courts would quickly be invited to give fuller meaning to the concept of "divided sovereignty". In the contrary event of the break-up of the Union, it may well be that the common law constitution would be left with only an English-centric (query: Welsh?) version of "continuity".<sup>122</sup>

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<sup>120</sup> On questions of reception see C Harlow, 'Export, Import: The Ebb and Flow of English Public Law' (2000) *Public Law* 240 and P Birkinshaw, *European Public Law: The Achievement and the Challenge* (WoltersKluwer 2<sup>nd</sup>, 2014) esp. ch 3. On global law see N Walker, *Intimations of Global Law* (Cambridge University Press, 2014).

<sup>121</sup> On Scotland see Armstrong n 9 above; and on Northern Ireland see Anthony, n 104 above.

<sup>122</sup> On continuity see Laws, n 2 above. For English-centric strains see Allison, n 5 above, p 6, and Sir Stephen Sedley, *Lions Beneath the Throne: Essays on the History of English Public Law* (Cambridge University Press, 2015), p 1. On Wales see R Rawlings, 'Riders on the Storm: Wales, the Union and Territorial Constitutional Crisis' (2015) 42 *Journal of Law and Society* 471.